Supreme Court, U.S.
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No. 02-367

IN THE

Supreme Court of the United States

AMERICAN CYANAMID COMPANY,
Petitioner,

v.

TERRY GEYE *and* BRANDON GEYE,
Respondents.

On Petition For A Writ of Certiorari To The Supreme Court of Texas

PETITIONER'S SUPPLEMENTAL BRIEF

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT (AMENDED)

As previously indicated, Petitioner American Cyanamid Company is a wholly owned subsidiary of Wyeth, and no other company owns 10% or more of Petitioner's stock. Petitioner wishes to note that in July 2000 its assets were sold by American Home Products Corporation (now known as Wyeth) to BASF Aktiengesellschaft.

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7 U.S.C. § 136v(b) ..... *passim*

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PETITIONER'S SUPPLEMENTAL BRIEF

Pursuant to Sup. Ct. R. 15.8, Petitioner American Cyanamid Company hereby submits this Supplemental Brief in further support of the petition for a writ of certiorari.

1. A recent FIFRA pre-emption opinion rendered by a Minnesota federal district court in a labeling-related agricultural crop injury case, *Dahlman Farms, Inc. v. FMC Corp.*, Civ. No. 01-986, 2002 WL 31750005 (D. Minn. Dec. 2, 2002), rejects the Texas Supreme Court's opinion in *Geye*, and thereby deepens the conflict created by the opinion below and underscores the need for this Court's review.

The plaintiff, Dahlman Farms, Inc., filed a Minnesota state court suit alleging that AIM, a FIFRA-registered herbicide, caused phytotoxic injury to its 1999 seed corn crop. The herbicide's EPA-approved labeling "stated that AIM could be used on seed corn and that such use would not result in a loss of yield." 2002 WL 31750005, at *2. Based on this label representation, and also on advertising and other "off-label" representations to the same effect, Dahlman brought Minnesota state law causes of action against the herbicide manufacturer for negligent testing, negligent labeling, strict liability, breach of express warranty, breach of implied warranty, and false advertising and consumer fraud. Following removal, the manufacturer moved for summary judgment on the ground that all of Dahlman's claims are labeling-related, and therefore, expressly pre-empted by § 136v(b) of FIFRA. The district court agreed and granted summary judgment.

Relying in part on *Geye*, "Dahlman argue[d] that the FIFRA's preemptive scope does not extend to claims based on the inadequacy of statements relating to pesticide efficacy – that is, statements regarding whether the pesticide actually works and whether it will harm the target crop it is supposed to protect – because such statements are not required under the FIFRA." *Id.* at *3; *see also id.* at * 4 (Dahlman "relie[d]

on . . . the recent decision of the Texas Supreme Court in [*Geye*], which held that the FIFRA does not preempt common law claims arising from crop damage because the EPA does not regulate pesticide efficacy").

The Minnesota federal district court, however, sharply criticized *Geye*'s holding:

> Dahlman's position that claims premised on the inadequacy of voluntary statements related to pesticide efficacy are not preempted is **not supported by the language or purpose of the FIFRA's preemption clause**. Again, section 136v(b) prohibits states from imposing or continuing in effect "any requirements for labeling or packaging *in addition to or different from* those required under [the FIFRA]." (Emphasis added.) As the italicized language demonstrates, **the scope of the provision is *not* limited to state requirements that overlap federal requirements**. The Texas Supreme Court in *Geye* adopted a different interpretation of section 136v(b), stating that "Congress has dictated that state actions regarding product labeling are preempted *to the extent that the content of the product label is regulated*." *Geye*, 79 S.W.2d at 22 (emphasis added); *see also id.* at 29 (stating "without EPA regulation, there can be no preemption"); *id.* (stating "the scope of FIFRA's preemption is dependent on what the EPA regulates"). **The Court respectfully disagrees with *Geye* on this point.** If the federal government's labeling requirements are limited to pesticide characteristics A, B, and C, and a state imposes a labeling requirement related to pesticide characteristic D, **the conclusion that the state requirement is both "in addition to" and "different from" the federal**

> **requirements seems inescapable. Furthermore, allowing states to impose such requirements could result in 50 different sets of requirements, each one potentially conflicting with some or all of the others, thereby frustrating the FIFRA's objective of establishing a uniform system of pesticide labeling requirements.**
>
> . . . the Eighth Circuit has never indicated that FIFRA preemption analysis depends on whether the allegedly inadequate statement was voluntarily undertaken or required by the EPA. . . . the Court concludes that breach of express warranty claims are preempted by the FIFRA if based on alleged misstatements made on an EPA-approved pesticide label, **without regard to whether the alleged misstatement is one required by the EPA.**

Id. at *4-*5 (italics in original) (emphasis added). The *Dahlman Farms* opinion, therefore, is squarely at odds with *Geye* and further supports the need for review and reversal of the Texas Supreme Court's opinion.

2. Another recent FIFRA pre-emption case, *Lowe's Home Centers, Inc. v. Olin Corp.*, No. 02-10518, 2002 WL 31730843 (11th Cir. Dec. 6, 2002), also holds, again contrary to *Geye*, that FIFRA pre-emption of labeling-related claims, including in connection with property damage, is not limited to statements that EPA requires to be placed upon a product's nationally uniform labeling.

The plaintiff, Lowe's, alleged that fire destroyed one of its retail stores because Olin, the manufacturer of a FIFRA-registered swimming pool chlorinating pesticide, failed to provide proper warnings regarding the combustion-related dangers of storing and handling the product. More specifically, Lowe's alleged that its

property suffered damage because Olin allegedly had failed to disclose certain hazard information in written storage and handling "Guidelines" – a document which the court of appeals indicated was "*not required by FIFRA* nor approved by the EPA." 2002 WL 31730843, at *6 (emphasis added).

Relying upon its landmark express pre-emption opinion in "*Papas II*," which found that "the term 'requirements' [in § 136v(b) of FIFRA] was sufficiently broad so as to cover jury damages awards and that challenges to warnings on materials other than the label of a product necessarily implies that the warning itself was inadequate," the court of appeals held that Lowe's claims are pre-empted. *Id.* (citing *Papas v. Upjohn Co.* ("*Papas II*"), 985 F.2d 516 (11th Cir. 1992), *cert. denied*, 510 U.S. 913 (1993)). In reaching this conclusion, the court also discussed its earlier, implied FIFRA pre-emption opinion in "*Papas I*," in which "the court noted that common law tort suits for inadequate labeling would hinder Congress' objectives, including uniform labeling across the nation." *Id.* at *4 (citing *Papas v. Upjohn Co.* ("*Papas I* "), 926 F.2d 1019 (11th Cir. 1992), *vacated and remanded sub nom. Papas v. Zoecon Corp.*, 505 U.S. 1215 (vacating and remanding for further consideration in light of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992)).

3. The Court's recent opinion in *Sprietsma v. Mercury Marine*, 123 S.Ct. 518 (2002), has no effect on FIFRA pre-emption of labeling related damages claims, including in agricultural crop injury suits.

The Court held in *Sprietsma* that the Federal Boat Safety Act ("FBSA") does not expressly or impliedly pre-empt a state common-law tort action seeking damages from the manufacturer of an outboard motor that allegedly caused a fatal injury because it was not equipped with a propeller

guard. To "encourag[e] uniformity of boating laws *insofar as practicable* [the FBSA] authorizes the Secretary of Transportation [Coast Guard] to issue regulations establishing '*minimum* safety standards for recreational vessels and associated equipment,' and requiring the installation or use of such equipment." 123 S.Ct. at 523 (citing 46 U.S.C. § 4302) (emphasis added). The FBSA contains an "express pre-emption clause [which] applies to 'a [state or local] law or regulation' " that is "not identical to a regulation prescribed under [the statute]." *Id.* at 524, 526 (quoting 46 U.S.C. § 4306). The FBSA also contains a "saving clause" which "states that '[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common law or under State law.' " *Id.* at 526 (quoting 46 U.S.C. § 4311(g)).

(a) After carefully analyzing the particular language that Congress chose to utilize in the FBSA's pre-emption clause, the Court held that the statute does not expressly pre-empt the plaintiff's claims:

> Here, the express pre-emption clause in § 10 applies to "a [state or local] law or regulation." 46 U.S.C. § 4306. We think that this language is most naturally read as not encompassing common-law claims for two reasons. First, the article "a" before "law or regulation" implies a discreteness – which is embodied in statutes and regulations – that is not present in the common law. Second, because "a word is known by the company it keeps" [citation omitted], the terms "law" and "regulation" used together in the pre-emption clause indicate that Congress pre-empted only positive enactments. If "law" were read broadly so as to include the common law, it might also be interpreted to include regulations, which would render the express

> reference to "regulation" in the pre-emption clause superfluous.

Id. at 526.

Unlike the FBSA, § 136v(b) of FIFRA bars any state-imposed (labeling) "*requirements*," a term which the Court in *Cipollone v. Liggett Group* described as "*much broader*" than the term "regulation." 505 U.S. 504, 520 (1992) (emphasis added). (The Court was comparing the 1969 federal cigarette act's pre-emption provision with its 1965 predecessor.) "Read against the backdrop of regulatory activity undertaken by state legislatures and federal agencies . . . the term 'regulation' most naturally refers to positive enactments by those bodies, not to common-law damages actions." *Id.* at 519. In contrast, the Court explained that the term "requirement[s] . . . *sweeps broadly* and suggests *no distinction* between positive enactments and common law." *Id.* at 521 (emphasis added).

Moreover, unlike the FBSA's regulation of boat safety, FIFRA's regulation of labeling does not merely "encourag[e] uniformity . . . insofar as practicable," or establish "minimum" standards which the States are free to supplement. Instead, Congress intended § 136v(b) "to *completely preempt* State authority in regard to labeling." H.R. Rep. No. 92-511, at 16 (1971) (emphasis added); *see Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597, 615 (1991) (labeling falls within an area that "FIFRA's 'program' pre-empts").

Furthermore, the Court found in *Sprietsma* that the FBSA's

> saving clause buttresses this [no express pre-emption] conclusion . . . the "saving clause assumes that there are some significant number of common-law liability cases to save [and t]he language of the pre-emption

> provision permits a narrow reading that excludes common-law actions."

123 S.Ct. at 526 (quoting *Geier v. American Honda Motor Co.*, 529 U.S. 861, 868 (2000)). Unlike the FBSA, however, FIFRA contains no saving clause for common law liability.

(b) The Court in *Sprietsma* also rejected the manufacturer's contention that the FBSA impliedly pre-empts the plaintiff's common-law claims because the Coast Guard decided not to require propeller guards. Quoting from *Geier*, 529 U.S. at 869, the Court reaffirmed that "Congress' inclusion of an express pre-emption clause 'does *not* bar the ordinary working of conflict pre-emption principles,' " but was not "persuaded . . . that the FBSA has any such pre-emptive effect." 123 S.Ct. at 527 (emphasis in original).

More specifically, the Court indicated that

> [w]ith regard to policies defined by Congress, we have recognized that "a federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *un*regulated, and in that event would have as much pre-emptive force as a decision *to* regulate."

Id. at 528 (quoting *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983)) (emphasis in original). The Court found, however, that although the Coast Guard chose to forgo adopting a propeller guard regulation, it "did not take the further step of deciding that, as a matter of policy, the States . . . should not impose some version of propeller guard regulation." *Id.* Further, the Court found that the Coast Guard's decision not to adopt a propeller guard regulation "presents a sharp contrast" to the situation in *Geier* (involving DOT's policy on installation of automobile driver's side airbags), where "Congress has delegated to DOT authority to implement the statute; the

subject matter is technical; and the relevant history and background are complex and extensive." *Id.* at 528, 529 (quoting *Geier*, 529 U.S. at 883).

Insofar as EPA, through its efficacy data waiver policy, has decided to forgo imposing *labeling* requirements for the purpose of preventing crop injury due to target area phytotoxicity, that necessarily is equivalent to a decision to leave that complex, technical subject "*un*regulated" on pesticide labeling, since § 136v(b) indisputably bars the States from imposing their own requirements for pesticide labeling. Thus, EPA's policy presents a sharp contrast with the situation in *Sprietsma*, where the Court found that the Coast Guard's propeller guard policy was not equivalent to a decision to leave that subject unregulated. Unlike the Coast Guard's propeller guard policy, EPA's efficacy data waiver policy falls squarely within *Arkansas Electric*, and has "as much pre-emptive force as a decision *to* regulate." *Arkansas Electric*, 461 U.S. at 384.

(c) The Court found in *Sprietsma* that "the FBSA did not so completely occupy the field of safety regulation of recreational boats as to foreclose state common-law remedies." 123 S.Ct. at 529. "The FBSA might be interpreted as expressly occupying the field with respect to state positive laws and regulations but its structure and framework do not convey a 'clear and manifest' intent . . . to go even further and implicitly pre-empt *all state common law* relating to boat manufacture." *Id.* at 530 (emphasis added).

In *Wisconsin Public Intervenor v. Mortier*, the Court found that FIFRA does not occupy "the field of pesticide regulation," but acknowledged that "labeling" does "fall within an area that FIFRA's [federal/state/local] 'program' pre-empts." 501 U.S. at 612, 615. This underscores an important distinction between the Court's analysis in *Sprietsma* and FIFRA pre-emption of *labeling-related* damages claims. Petitioner does not contend, and the case

law does not hold, that FIFRA pre-empts damages claims that are *un*related to labeling, much less *all* damages claims. *See, e.g., Andrus v. AgrEvo USA Co.*, 178 F.3d 395, 398 (5th Cir. 1999) (quoting *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1024 (5th Cir. 1994)) (explaining that § 136v(b) "does not preempt common law that is unconcerned with herbicide labeling"). But "[w]hen a claim, however couched, boils down to an assertion that a pesticide's label failed to warn of the damage plaintiff allegedly suffered, the claim is preempted by FIFRA." *Etcheverry v. Tri-Ag Serv., Inc.*, 993 P.2d 366, 377 (Cal. 2000).

4. Subsequent to the filing of Petitioner's reply brief, Respondents submitted a supplemental brief arguing that the opinion below is not "final" for purposes of § 1257 jurisdiction because the Texas Court of Appeals would have had no original jurisdiction to make a factual finding regarding the labeling-related nature of their claims. The short answer to Respondents' contention is that in the state court of appeals, they contested, but the court of appeals exercised its appellate jurisdiction to affirm, the trial court's finding that all of their claims relate directly or indirectly to the labeling. As discussed in Petitioner's reply brief, the court of appeals, after reviewing the "summary judgment proof," treated the subject as a factual matter. *See* Reply Br. at 2 n.2. Under the Texas Constitution the court of appeals' decision to affirm the trial court's finding that the claims are labeling-related is conclusive and cannot be reviewed by the Texas Supreme Court. *See id.* at 3-4. In any event, Respondents concede that at least some of their claims are labeling-related. *See id.* at 4 n.4. The Texas Supreme Court's opinion is a final judgment within the meaning of § 1257, and this Court has jurisdiction.

For the foregoing reasons, and those presented previously, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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